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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LAKESHORE VIEW HOMEOWNERS' ASSOCIATION, Plaintiff and Respondent, v. PIN LIAN TU, Defendant and Appellant.	A123298 (Alameda County Super. Ct. No. RGO7312278)

I. INTRODUCTION

Defendant Pin Lian Tu appeals from a judgment following a court trial and from an order awarding attorney fees to plaintiff Lakeshore View Homeowners' Association (Lakeshore). Tu raises two issues on appeal: (1) she was erroneously denied a jury trial, and (2) the fee award was an abuse of discretion. We affirm the judgment and fee award.

II. BACKGROUND

We only briefly summarize the factual and procedural background here, discussing the specific facts and proceedings relevant to the two issues raised on appeal in our discussion of those issues.

Lakeshore is a homeowners' association charged with the maintenance and repair of a 22-unit condominium project overlooking Lake Merritt in Oakland. Lakeshore approved several assessments for repair work and determined the order in which the condominium units would be repaired. Tu owned one of the condominiums, disagreed with how some repairs were being handled, and stopped paying the assessments.

Lakeshore perfected a statutory lien on Tu's unit to secure payment of the assessments and, on February 22, 2007, filed suit against her for foreclosure of the lien, breach of the covenants, conditions and restrictions (CC&R's) and several common counts. Tu, in pro per, filed an answer on April 5, 2007. On October 4, 2007, she filed a cross-complaint for conversion, breach of contract, negligence and abuse of process, seeking damages in excess of $70,000 and $1 million in punitive damages.

After three continuances of the trial date, the case was tried to the court during June and July 2008. The court issued its statement of decision and judgment on October 2, 2008, awarding Lakeshore $27,584.68 and awarding Tu $4,000 for unfinished work on an interior wall in her condominium unit. The court applied the award to Tu as a set-off against the amount she owed Lakeshore, resulting in a net judgment for Lakeshore of $23,584.68. Tu was ordered to pay within 30 days; if she failed to do so, her condominium was ordered to be sold at public auction. The court ruled Lakeshore, as the prevailing party, was entitled to seek attorney fees by way of noticed motion. Tu filed a notice of appeal from the judgment on October 10, 2008.

On October 31, 2008, Tu filed a petition for protection under the bankruptcy laws. The bankruptcy court dismissed her petition on November 25, 2008, for failure to supply required documents and to attend bankruptcy counseling.

On December 16, 2008, the trial court issued an order for sale of the condominium property since Tu had not paid the judgment, which she had been ordered to do by November 1, 2008.

In the meantime, on October 16, 2008, Lakeshore had filed its motion for attorney fees, seeking $109,513. The record contains no written opposition by Tu.[1] She did, however, appear at the hearing on November 14, 2008. After taking the motion under submission, the court issued a written order on January 8, 2009, awarding Lakeshore

[1] Apparently Tu filed some kind of written statement either at or just prior to the hearing. The court allowed Tu to read several paragraphs pertaining to fees, but not paragraphs pertaining to her complaints about the merits of the case and judgment. Tu, nevertheless, focused for the most part on the merits of the case and her quarrel with Lakeshore over the assessments.

$65,707.80. Tu filed an amended notice of appeal on January 15, 2009, that included the fee order.

For reasons that do not appear in the record on appeal, no sheriff's sale had occurred as of May 2009, and during that month, Tu retained appellate counsel. On June 10, 2009, Tu's counsel moved for a stay of the sale pending appeal, which the trial court granted by way of orders filed June 26, 2009, and August 17, 2009.

III. DISCUSSION

Waiver of Jury Trial

Tu claims she never waived her right to a jury trial, and the trial court therefore prejudicially erred when it proceeded with a bench trial. Lakeshore contends Tu waived her right to a jury trial. We agree with Lakeshore.

A precise procedural chronology is important on this issue. Our review of the record on appeal shows the following: Lakeshore filed its complaint against Tu on February 22, 2007. The trial court held a case management conference on September 10, 2007. Tu appeared in pro per and demanded a jury trial. The court set the case for jury trial in five months, on February 8, 2008. On November 19, 2007, Edward Hung substituted in as counsel for Tu.

Ten days before the scheduled trial date, the parties asked to continue the trial until April 7, 2008, for three reasons: (1) Tu's counsel needed more time to prepare; (2) Tu's expert had not finished a "supplement" to a December 2007 "report"; (3) the parties had agreed to attend mediation in March 2008. The stipulation made no reference to a jury trial. Nor had Tu posted jury fees. Nevertheless, on February 2, 2008, the trial court continued the matter for "jury trial" to April 4, 2008. Tracking the language of Code of Civil Procedure section 631, subdivision (b),[2] the court's notice of the new date stated jury fees had to be posted "no later than 25 calendar days before the date initially set for trial."

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

On February 20, 2008, Hung moved to withdraw as Tu's attorney on grounds Tu refused to cooperate and refused to pay him. At a noticed hearing on March 24, 2008, at which Tu was present, the trial court granted Hung's motion and ordered the case to proceed to trial as scheduled. No reference was made to whether the trial would be before a jury or the court.

The case was called for trial on the scheduled date, April 4, 2008. Neither party appeared,[3] and Tu still had not posted jury fees. The court vacated the trial date and reset the matter for a court trial on June 27, 2008, in a minute order stating: "Counsel for defendant having been relieved on 3/24/08, the court on its own motion orders the Jury Trial dropped and the matter will be reset as a Court Trial. [¶] Civil Court Trial scheduled on 6/27/08 . . . ."

A month later, on May 5, 2008, Tu filed a document entitled "Objection to the court order setting the case for a one-day court trial, and Request for a Jury Trial." She claimed she did not understand how she "ended up" with her attorney being removed "over [her] objection" and with a court trial, and asserted she had "never waived" her right to a jury. Tu did not, however, file a motion to restore the case to the jury trial calendar or to vacate any waiver of her right to a jury trial. Nor did she take any other step to bring her "Objection" to the attention of the court. Nor did she post jury fees.

Six weeks later, on June 18, 2008, Tu deposited jury fees—more than two weeks after the deadline to do so under section 631, subdivision (b) (even assuming the continued and then further continued trial dates constituted the "date initially set for trial"). (§ 631, subd. (b).)

The case proceeded to trial on June 30, 2008. At the outset, the court discussed preliminary procedural matters with counsel for Lakeshore and with Tu. Tu said *nothing* about her previously filed written "Objection" to a court trial, and there is no indication in the record the trial court was aware of it. Tu also said *nothing* about having deposited jury fees, and there is no indication in the record the trial court was aware of it. And Tu

[3] The record does not indicate why.

made *no objection* to proceeding with trial before the court. Rather, based on her on-the-record conduct at the outset of trial, she was, by all indications, prepared to proceed before the court and in the manner outlined by the court. The record further reflects the trial court was both polite to and exceedingly patient with Tu. Thus, she had ample opportunity to raise the issue of a jury trial at the outset of the trial proceedings and to make an appropriate motion to preserve the issue.

California Constitution article I, section 16, provides litigants with the right to a jury trial in civil actions like the one at hand. (Cal. Cost., art. I, § 16; Code Civ. Proc., § 631, subd. (a).) However, this right is not absolute and can be waived. (§ 631, subds. (a), (d).) The fact Tu was proceeding in pro per does not excuse her from complying with all applicable statutory and case law. (See *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.)

Section 631, subdivision (a), provides that "[i]n civil cases, a jury may only be waived pursuant to subdivision (d)." (§ 631, subd. (a).) Subdivision (d) provides that a party "waives trial by jury in any of the following ways: [¶] (1) By failing to appear at the trial. [¶] (2) By written consent filed with the clerk or judge. [¶] (3) By oral consent . . . . [¶] (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. [¶] (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b). [¶] (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (c)." (*Id.*, subd. (d).) Subdivision (b) specifies in pertinent part that advance jury fees must be deposited with the clerk or judge "at least 25 calendar days before the date initially set for trial." (*Id.*, subd. (b).) Subdivision (c) specifies in pertinent part that "at the beginning of the second and each succeeding day's session," fees and mileage costs for the jurors must be deposited with clerk or judge. (*Id.*, subd. (c).)

It is undisputed Tu did not post jury fees "at least 25 calendar days before the date initially set for trial" as required by section 631, subdivision (b). (§ 631, subd. (b).) Trial

was "initially set" for February 8, 2008. Accordingly, Tu was required to post fees on or before January 14, 2008. She did not do so, and therefore waived her right to a jury. Even if the continued trial date of April 4, 2008, was deemed the date "initially set for trial," fees were due on or before March 9, 2008. Tu did not post fees by that date, either. Finally, even if the further continued trial date of June 27, 2008, was deemed the date "initially set for trial," fees were due on or before June 2, 2008. Tu also did not post fees by that date. She thus thrice waived a jury trial under section 631, subdivision (d)(5). (*Id.*, subd. (d)(5).) She also failed to appear on the continued trial date of April 4, 2008. Accordingly, she also waived a jury trial under section 631, subdivision (d)(1). (*Id.*, subd. (d) (1).)

Where, as here, there has been a jury waiver, subdivision (e) of section 631 provides the trial court "may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury." (§ 631, subd. (e).) "Because the matter is one addressed to the discretion of the trial court, that court's denial of a request for relief of jury waiver cannot be reversed in the absence of proof of abuse of discretion." (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507 (*Gonzales*).) "[A]s long as there exists 'a reasonable or even fairly debatable justification, under the law, for the [court's denial of a request for relief], such [denial] will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below . . . .' [Citation.]" (*Ibid.*)

Nevertheless, a trial court can be found to have abused its discretion in denying relief from a jury waiver where the party's original waiver was inadvertent, rather than deliberate, and where neither the adverse party nor the court will suffer prejudice from allowing relief. (E.g., *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104; *Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 602-603; *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654.) Notably, these cases were writ proceedings in which the aggrieved party both promptly made a motion for relief from jury waiver and challenged the denial of relief, *before trial commenced*. (See also *Boal v. Price*

Waterhouse & Co. (1985) 165 Cal.App.3d 806, 809 [party moved for relief from waiver as soon as waiver was discovered and before trial commenced].)

Here, Tu made no motion seeking relief from her loss of a jury trial. Nor did she make any other effort to bring her written "Objection" to a court trial to the trial court's attention, and there is no indication in the record the court was aware of it. Accordingly, there was never any motion or request before the trial court as to which the court could exercise its discretion. Perforce, subdivision (e), never came into play. Thus, there is no basis upon which it could be said the trial court "abused its discretion" in "denying" relief from the jury waiver, since no relief was ever sought.

Furthermore, Tu said absolutely nothing about a jury when the case was called for trial. She made no objection to proceeding before the court and, instead, proceeded to put on her case. A party cannot appear for trial, remain mum about relief from a jury waiver, try the case before the court without objection, and then, after suffering an adverse decision, tell the court for the first time the case should have been tried before a jury. (See *Gonzales*, *supra*, 20 Cal.3d at pp. 503-509 [court did not abuse discretion in denying relief from jury waiver where party waited to seek relief until after special defenses were argued, suggesting party had a change of heart about the tactical advantages of a court versus a jury trial]; *Taylor v. Union Pac. R.R. Corp.* (1976) 16 Cal.3d 893, 900 [where party that had previously waived jury failed to affirmatively request jury after other party waived and, instead, proceeded with trial, party waived jury; " 'Defendant[] cannot play "Heads I win. Tails you lose" with the trial court.' "], quoting *Tyler v. Norton* (1973) 34 Cal.App.3d 717, 722.) By proceeding without objection before the court, Tu effectively consented to a jury trial waiver within the meaning of section 631. (See *Escamilla v. California Ins. Guarantee Assn.* (1983) 150 Cal.App.3d 53, 58-64.)

We therefore reject Tu's claim that she was improperly denied a jury trial.

Attorney Fees Award

Tu does not take issue with the trial court's ruling that Lakeshore was the prevailing party and entitled to recover attorney fees. She contends the trial court abused its discretion, however, in awarding Lakeshore $65,707.80 in fees, complaining this was

"almost three times" the amount of the judgment. Lakeshore argues the trial court's order shows the court properly evaluated the factors pertinent to determining a reasonable fee award, and this is further reflected by the fact the court awarded Lakeshore nearly $40,000 less in fees than it requested. We agree with Lakeshore and affirm the award.

We review the amount and apportionment of attorney fee awards for an abuse of discretion. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175; *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1381; *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46.) The standard of review is set forth in *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1394, as follows: " 'California courts have long held that trial courts have broad discretion in determining the amount of a reasonable attorney's fee award. This determination is necessarily ad hoc and must be resolved on the particular circumstances of each case.' (*Meister*[*v. Regents of University of California* (1998)] 67 Cal.App.4th [437,] 452.) In exercising its discretion, the trial court may accordingly 'consider all of the facts and the entire procedural history of the case in setting the amount of a reasonable attorney's fee award.' (*Ibid.*) An attorney fees award ' "will not be overturned in the absence of a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence. [Citations.]" [Citation.]' (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894 . . . .)"

Our Supreme Court has held: " 'It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court . . . . [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623-624 . . . .)" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th

1084, 1096.) Moreover, as the Supreme Court explained in *Serrano v. Priest* (1977) 20 Cal.3d 25, 49: "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' [Citations.]" (Accord, *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 751-752; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447-448.)

It is the appellant's burden to establish an abuse of discretion. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Our Supreme Court has held: "[A] reviewing court should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. . . . 'It is fairly deducible from the cases that one of the essential attributes of abuse of discretion is that is must clearly appear to effect injustice. [Citations.] Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 566; see *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 138, 157.)

Tu first argues the $109,513 Lakeshore sought in fees was "outrageous" given its net recovery of $23,584 and claims even the reduced award of $65,707.80 was punitive and unreasonable. However, she identifies no specifics as to why the award is purportedly excessive. She does not take issue with the rates Lakeshore claimed for its attorneys, nor does she identify any specific tasks she contends were unfairly reported. Accordingly, she has not carried her burden to show an abuse of discretion by the trial court in accepting the hourly rates requested or crediting the work done by Lakeshore's attorneys. Moreover, having observed the parties, the trial court was in a particularly good position to determine the reasonableness of the time spent by Lakeshore's attorneys.

Lakeshore explained its attorney's "office was quite frankly run ragged responding to improperly filed incoherent documents that M[s.] Tu was barraging [the] Court with." The court agreed "many of the attorney hours here can be explained by the conduct of Ms. Tu in the course of this case."

Tu next argues the trial court erroneously awarded fees for work attributable to defending against her cross-complaint. She asserts the trial court acknowledged the time Lakeshore spent proving what assessments were made (and the interest and late charges owed thereon) was "minimal" and therefore claims the award grossly exceeded what could be awarded pursuant to Civil Code section 1354 and the CC&R's.[4] However, the trial court explained Tu's cross-claims "were interrelated with the association's valid complaint that she had wrongfully refused to pay her monthly assessments."

When the work on a nonfee claim is so closely related to work on a fee claim that apportionment is impossible or impracticable, courts can award fees for the entire case or make a reduction that in the court's sound judgment reflects an appropriate apportionment of fees between the claims. (See *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 421-424; *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133 (*Akins*).) "When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award." (*Akins, supra*, 79 Cal.App.4th at p. 1133, citing *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.) "When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and

[4] Civil Code section 1354, subdivision (c), provides: "In an action to enforce the governing documents [of a homeowner's association], the prevailing party shall be awarded reasonable attorney's fees and costs."

claims for which they are not, then allocation is not required." (*Akins*, at p. 1133.) Likewise, "[w]hen the time spent on successful and unsuccessful claims cannot be easily segregated, a negative multiplier can be applied to account for that partial success." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 157, citing *Soklow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 250; see also *Meister v. Regents of University of California, supra*, 67 Cal.App.4th at p. 448, fn. 9.)

Here, after reducing the amount requested to reflect some block billing, the trial court reduced the amount requested by another 25 percent to reflect Tu's limited success of her cross-claims, again emphasizing her cross-claims were "interrelated with the association's action." Having presided over the trial, the trial court did not abuse its discretion in determining the claims were interrelated or in reducing the award to reflect that Lakeshore was not 100 percent successful.

Tu further argues the trial court did not sufficiently reduce the fee award to reflect "block billing" on portions of the invoices. Tu cites no authority that "block billing" is legally insufficient to support a fee award. Moreover, the "block" entries on the time sheets submitted in support of the fee motion are not overly generic or excessive in length by any means. The trial court explained its general concern with "block billing" as putting "in question the exact count of hours and minutes devoted to a case." This concern is more accurately stated as an inability to determine the exact time spent on specific tasks. To address its concern, the trial court reduced the amount Lakeshore sought by 20 percent (more than $20,000). Again, given its familiarity with the case, and having observed the efforts of the attorneys, this assessment of the time reasonably spent in connection with Lakeshore's action was well within the trial court's sound judgment.

Tu argues the trial court failed to reduce the award to account for several "double" time entries. Tu did not identify or object to any of these supposedly duplicate entries in the trial court, and it is impossible to determine from the record whether these were in fact duplicate entries or whether they simply reflect further work on the same task. She therefore has not carried her burden of showing any abuse of discretion in "failing" to further reduce the fee award.

Finally, Tu argues the trial court failed to consider her own financial resources in determining the amount of fees to award. But, again, Tu never raised this issue in the trial court. The trial court therefore had no evidence in this regard before it, and it certainly cannot be said to have abused its discretion in this respect.

Her reliance on *Garcia v. Santana* (2009) 174 Cal.App.4th 464, is therefore misplaced. In that case, members of a housing cooperative for low income tenants sued the owner and its building managers. After counsel for the plaintiff (in intervention) withdrew, the defendants moved for summary judgment. There was no opposition, the motion was granted, and the defendants sought fees, which the trial court denied in light of the plaintiff's indigent status. The Court of Appeal reversed and remanded for further proceedings in a decision comprised of three opinions. The majority focused at length on the public policy of access to the courts to support the propriety of considering the losing party's financial status on determining "reasonable" fees under Civil Code section 1354. Because the trial court had focused solely on inability to pay and had not also considered any other traditional factors, the court reversed for further proceedings. (*Garcia v. Santana*, at pp. 469-477.) One concurring opinion agreed reversal was required and also that financial condition was "one" factor the court could consider, along with other traditional factors, but expressed "discomfort" with the majority's reliance on a "clearly distinguishable" access case. (*Id.* at pp. 478-479 (conc. opn. of Woods, J.).) The second concurring (and dissenting) opinion agreed reversal was required but did not agree financial condition had any place in the fee analysis. (*Id.* at pp. 479-483 (conc. & dis. opn. of Jackson, J.).) We do not need to consider which of these three opinions we might agree with since Tu never asked the trial court to consider her financial status, nor submitted any evidence of such, and thus waived this argument on appeal. (See *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.)[5]

[5] Tu, again appearing in pro per, filed an appellant's reply brief which, in considerable measure, is difficult to understand. Some of her arguments are new. Not having been made in her opening brief, they are waived, and we do not consider them.

IV. DISPOSITION

The judgment in favor of Lakeshore and the order awarding Lakeshore attorney fees are affirmed.

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Banke, J.

I concur:

_____
Margulies, Acting P. J.

(See *Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115.) We also deny her request to file an additional appendix of material. The record on the issues raised in her opening brief is already before us, and the materials in the additional appendix do not pertain to those issues.

I concur in the judgment of this case.

I write separately because I believe the evidence supports the conclusion appellant waived her right to a jury trial. Her failure to request a jury trial when she appeared pro per before the trial court on June 27, 2008, the date set for commencing the trial, and then her continued reluctance to advise the court she wanted a jury trial as the matter proceeded for three days, amount to a legal waiver of the right. The fact she posted the jury trial fees on June 18, 2008, and the filing of her motion captioned "objection to the court order setting the case for a one-day court trial, and request for a jury trial" on May 5, 2008, did not prevent appellant's need to assert the right before the trial court when the trial was scheduled to begin.

Adherence to a statutory time limitation for posting fees in dealing with constitutional rights, especially when dealing with pro per litigants, may amount to excessive formalism. The trial courts serve the public, and the rights of self-represented parties especially should not be evaluated always by dates on a calendar. As one court observed: "Where the right to jury is threatened, the crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver [of fees] is granted." (*Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104; see also *Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 809, quoting *Estate of Meeker* (1993) 13 Cal.App.4th 1099, 1106 [" '[W]e need to remember that all of us are here to serve the public and that this cannot be done when judges are inundated with fast-track statistics and cheerleader attitudes about case disposition numbers which never seem to take into account the rights of the parties.' "].)

Yet to realize this right, it is incumbent on the moving party to assert the claim. (*Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833, 835.) Her silence is not an enabler for reversal in this case. I assume appellant was aware of her options. She made the decision to proceed without speaking up when she should have. The waiver therefore was effective. Providing relief now would surely guarantee the consequence of "Heads I win. Tails you lose."

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Dondero, J.